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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No [redacted] 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Questions presented	1
Statement of the case	2
Reasons for denying the writ	4
I. The writ should be denied because the underlying controversy between the parties has been completely settled and a decision of this Court would have no effect on the parties or the issues below	4
II. The District Court properly remanded the Awards of the ~~P. L.~~ Board to that Board within jurisdiction delegated by the Railway Labor Act and as ordered by this Court	7
III. The Appellate Court properly held that the remand to the Board ordered by the District Court was not an appealable order because it did not constitute a "final decision"	10
Conclusion	12
Appendix A	A-1

Cases Cited

Bohms v. Gardner, 381 F. 2d 283 (8 Cir. 1967) 11

Brotherhood of Railroad Signalmen v. Southern Ry. Co., 380 F. 2d 59 (4 Cir. 1967), cert. den. 389 U. S. 958 9

Catlin v. United States, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945) 10, 11

Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 (1945).. 8

Mills v. Green, 159 U. S. 651 (1895)..... 4

Oil Workers Unions v. Missouri, 361 U. S. 363 (1959) 4

Order of Conductors v. Pitney, 326 U. S. 561 (1946).. 8

Sears, Roebuck & Co. v. Carpet Layers, 90 S. Ct. 1299 (1970) 4

Taggart v. Weinacker's, Inc., 90 S. Ct. 876 (1970).... 5

Transportation-Communication Employees Union v. Union Pacific, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966) 3, 7, 8, 9

U. S. v. Alaska S. S. Co., 253 U. S. 113 (1920)..... 5

Statutes Cited

28 U. S. C. A., § 1254 10

28 U. S. C. A., § 1291 ..... 2, 3, 10

45 U. S. C. A., § 153 ..... 2, 3, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1564

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari, review and decide a mooted controversy which was fully and completely settled by agreement of the parties during pendency in the Appellate Court.

2. Whether a District Court has jurisdiction to remand Awards rendered by a Special Board of Adjustment established under § 3 Second of the Railway Labor Act

(1966 Amendment) for the purpose of determining the existence or non-existence of any third party claims and to require a final decision incorporating such determination.

3. Whether remand to a Special Board of Adjustment by a District Court for the purpose of determining the existence or non-existence of third party claims constitutes a "final decision" within the intendment of 28 U. S. C. A., § 1291.

STATEMENT OF THE CASE

This case has its origin in a Complaint for Injunction filed by Transportation-Communication Employees Union, et al. (hereinafter called "TCU") against St. Louis-San Francisco Railway Company (hereinafter called "Frisco") (R. 133). By way of permissive counterclaim Frisco prayed for judicial review of 12 awards entered by a Board (hereinafter called "P. L. Board 34") which had been created in accordance with 45 U. S. C. A., § 153, Second (as amended 1966) (R. 5). Review was sought within the scope of 45 U. S. C. A., § 153, First (q). TCU subsequently dismissed its Complaint and all that remained alive for decision was judicial review of the P. L. Board awards (R. 2, 133, 134). TCU later filed a "Counterclaim by Plaintiffs to Counterclaim by Defendant" and both parties subsequently filed Motions for Summary Judgment with exhibits attached thereto (R. 2, 3). The Memorandum Opinion of the Court (296 F. Supp. 507; R. 133) failed to specifically grant or deny either party's Motion, but remanded the awards to the Board for further determination pursuant to the jurisdiction granted by Congress in the 1966 Amendments to the Railway Labor Act, 45 U. S. C. A., § 153, First (q):

> "* * * The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or

in part, or it may remand the proceeding to the division for such further action as it may direct."

Prior to the 1966 Amendments to the Railway Labor Act, the Court's jurisdiction on judicial review of Board awards was limited either to enforcing or setting aside the awards (45 U. S. C. A., § 153, First (p), prior to June 20, 1966) however, the Amendments made by Congress in 1966, among other changes, gave the Court jurisdiction to remand the proceedings for such further action as the Court may direct. The District Court determined in light of the mandate of the Railway Labor Act and the decision of this Court in **Transportation-Communication Employees Union v. Union Pacific,** 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966), that P. L. Board 34 must consider and interpret TCU's labor agreement and scope of rights claimed thereunder in the light of rights belonging to members of other unions who may have an interest. The Court below remanded the awards to the Board for review and a determination of the effect, if any, other union contracts may have on the subject awards (R. 142).

The Order of the Court remanding the awards to the Board was the decision identified by TCU from which it filed its Notice of Appeal to the United States Court of Appeals for the 8th Circuit (R. 153).

That Court held that the remand ordered by the District Court was not such "final decision" as to be proper subject of an appeal under 28 U. S. C. A. 1291 and that there would be no such "final decision" until and unless the Board performed the further duties ordered by the District Court.

After argument and submission in the United States Court of Appeals for the 8th Circuit on November 20, 1969, the parties settled all matters then in dispute between them, including the claims on behalf of the in-

dividuals which constituted the subject matter of the attacked awards. On December 5, 1969, the parties filed a joint suggestion of mootness in the Appellate Court (App. A). However, that Court rendered its Opinion on December 19, 1969 noting that the suggestion of mootness had been filed subsequent to the preparation of the Opinion but before the filing thereof (App. E to Petition for Writ). Thus, despite the fact that the controversy has been conclusively established on the record as moot, Petitioner's Petition for a Writ of Certiorari to this Court seeks review of the decision of the United States Court of Appeals for the 8th Circuit dismissing Petitioner's appeal for want of jurisdiction.

REASONS FOR DENYING THE WRIT

I

The writ should be denied because the underlying controversy between the parties has been completely settled and a decision of this Court would have no effect on the parties or the issues below.

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

So said this Court in 1895 in **Mills v. Green**, 159 U. S. 651, 653. Perhaps no principle has been adhered to with more unwavering loyalty. That principle was observed as a polestar in **Oil Workers Unions v. Missouri**, 361 U. S. 363, 367 (1959), which in turn was cited in the recent opinion of this Court rendered April 27, 1970 in **Sears, Roebuck & Co. v. Carpet Layers**, 90 S. Ct. 1299, when this Court restated "To adjudicate a cause which no longer exists

is a proceeding this Court uniformly has declined to entertain" (l. c. 1300).

We do not even have here any semblance of the "small embers of controversy", the "bare remnant of the original controversy" or the "atrophied controversy" described by this Court in **Taggart v. Weinacker's, Inc.**, 90 S. Ct. 876, decided March 9, 1970, while dismissing a Writ as improvidently granted. Here, not even a scintilla of a controversy remains, and

> "Where by an act of the parties or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' **California v. San Pablo & Tulare R. R. Co.**, 149 U. S. 308, 314; **United States v. Hamburg-American Line**, 239 U. S. 466, 475, 476, and previous cases of this court therein cited."

U. S. v. Alaska S. S. Co., 253 U. S. 113, 116 (1920).

Respondent observes the law on this point to be so crystal clear that it will not belabor this Court with additional citations to a principle with which this Court is so intimately familiar. The record in this case is equally clear in reflecting the motion signed and filed by the parties in the United States Court of Appeals for the 8th Circuit (App. A) which by its very first sentence states:

"Come now the Appellants and the Appellee, by their respective counsel, and jointly show to the Court that this case has been settled by agreement of the parties."

The agreement between the parties settling the dispute is not contained in the record below because it was executed subsequent to argument and submission in the Appellate Court. That agreement, dated December 1, 1969, among other settled matters not relevant here, contains the following two paragraphs which deal specifically with this case:

"3. The parties will jointly petition the Court of Appeals for a dismissal of Civil Case No. 19,685 in the United States Court of Appeals for the Eighth Circuit;

"4. Carrier will allow the claims as sustained by Public Law Board No. 34 in Cases Nos. 18, 23, 24, 54, 55, 56, 57, 58, 59, 60, 61 and 72, with the understanding that any reference in such awards to use of radio will not be referred to in the future by either party in the handling of any similar claim. It is understood that the use of radio is not reserved exclusively to telegraphers, but it is agreed that telegraphers shall have the right to handle train orders, block or report trains, receive or forward written messages by radio."

The parties did jointly petition the Court of Appeals for a dismissal of the case in accordance with the agreement contained in paragraph 3. Frisco has also paid the individual claims contained in all of the listed cases before P. L. Board 34, which constituted the subject matter of the court proceedings.

Thus, if this Court should grant Petitioner's Petition for Writ, any judgment which could subsequently be entered would constitute a mere advisory opinion of academic

interest only because it could not possibly have any binding effect or guidance upon the litigating parties. Both parties have already received full satisfaction by their settlement. TCU achieved payment for the individual claims and agreed to dismiss its appeal. Frisco was accorded relief from the decisions rendered by P. L. Board 34 and was permitted to proceed without any binding effect of those awards complicating and confusing its future dealings with other unions.

II.

The District Court properly remanded the Awards of the P. L. Board to that Board within jurisdiction delegated by the Railway Labor Act and as ordered by this Court.

Contrary to the "gross misapplication of this Court's decision in the **Union Pacific** case" as charged by Petitioner in its Petition for a Writ of Certiorari (page 12) the action taken by the District Court when it remanded the awards to the Board for further consideration was in strict compliance with the mandate of this Court in **Transportation-Communication Employees Union v. Union Pacific R. R.**, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966). This was the only just and lawful Order which could be entered if the District Court properly classified the issues before the Board as minor disputes. This Court has set out the directive which the District Court meticulously followed in this case in the clearest terms. In **Union Pacific**, supra, the Court discussed the nature of a collective bargaining agreement in the railroad industry and then stated:

> "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." (385 U. S. 157, l. c. 161.)

It further went on to define the policy behind rendering such Board awards to be the complete, absolute and final settlement of all disputes in a prompt and orderly manner. Justice Black in writing for the majority of the Court, stated:

> "By first ordering the railroad to pay one union and then later, in a separate proceeding, ordering it to pay the other union, without ever determining which union has the right to perform the job and thus without ever prejudicing the rights of the other union, the Board abdicates its duty to settle the entire dispute. Yet this is precisely the kind of merry-go-round situation which the petitioner claims is envisaged by the Act, a procedure which certainly does not 'provide for the **prompt** and **orderly** settlement of **all** disputes . . .,' the purpose for which the Adjustment Board was established. §2 (5). (Emphasis supplied.)" (l. c. 162.)

The final paragraph of the District Court's Opinion requires precisely but no more than was ordered by this Court in **Union Pacific**, supra, and is founded on the same sound principles recognized as the philosophy of the intent of Congress when it created special bodies possessed of expertise necessary to resolve those controversies classically called "minor disputes".

> **Order of Conductors v. Pitney**, 326 U. S. 561 (1946); **Elgin, J. & E. R. Co. v. Burley**, 325 U. S. 711 (1945).

The District Court's obligation and the District Court's duty under the circumstances was to examine and to analyze in order to determine whether or not a prompt, orderly and final disposition had in fact been made by the Board. Its informed conclusion was that the Board had not accomplished its full duty, and the District Court then faced the alternatives of setting aside or remanding. Remand to the Board was the remedy selected.

The fact that the record fails to identify a competing union as making active claim to the work does not serve to relieve a reviewing Court of its duty to require the Board to comply with the requirements of law. In **Brotherhood of Railroad Signalmen v. Southern Ry. Co.**, 380 F. 2d 59 (4 Cir. 1967), cert. den. 389 U. S. 958, the Court also reviewed **Transportation-Communication Employees Union v. Union Pacific R. R. Co.**, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966), and similarly remanded for a determination of any other union's interest, holding:

> "The record before us, containing only scant reference to the existence of a competing union and referring not at all to its contract, fails to provide an adequate basis for resolution of the 'entire dispute'."

further:

> "The Supreme Court in **Transportation-Communication** has made known its view that the union's failure to complain will not be deemed sufficient reason for disregarding its contract" (l. c. 65).

Prior to the 1966 amendments to the Railway Labor Act, a court's jurisdiction on judicial review of Board awards was limited either to enforcing or setting aside the awards (45 U. S. C. A., § 153 First (p) prior to June 20, 1966). However, when Congress enacted the amendments in 1966 among other changes was an added alternative given to the courts:

> "The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct." (45 U. S. C. A., § 153 First (q).)

The action taken by the District Court was in strict compliance with the statute and constituted a classic example of the need for and utilization of the remand procedure.

III

The Appellate Court properly held that the remand to the Board ordered by the District Court was not an appealable order because it did not constitute a "final decision."

Judicial review of Board awards accorded by District Courts in accordance with 45 U. S. C. A., § 153 First (q) is in turn made reviewable as provided in §§ 1291 and 1254 of Title 28. The United States Court of Appeals for the 8th Circuit properly held that the remand ordered by the District Court did not constitute that "final decision" which qualifies for appeal in accordance with 28 U. S. C. A., § 1291.

Many standards for determining the true finality of a "final decision" or a "final judgment" have been enunciated by the Courts in analyzing appealability, however all embody the common requirement that there must have been an adjudication on the merits for finality to exist. A guiding pronouncement on this determination was made by this Court in **Catlin v. United States**, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945). The Court said:

> "Their right to appeal rests upon § 128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. **St. Louis, I. M. & S. R. Co. v. Southern Express Co.**, 108 U. S. 24, 28. * * * The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' **Luxton v. North River Bridge Co.**, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals" (l. c. 233-234).

Catlin is well recognized in the 8th Circuit and was relied on in **Bohms v. Gardner**, 381 F. 2d 283 (8th Cir. 1967). The following analysis is found in that opinion written by Blackmun, C.J.:

> "From this it inevitably follows, we feel, that the present appeal must be dismissed. Although the Secretary made a final administrative decision for purposes of court review under § 205 (g), Cody v. Ribicoff, 289 F. 2d 394, 395 (8 Cir. 1961); Murphy v. Gardner, 379 F. 2d 1 (8 Cir. 1967), no such decision was made at the district court level. And it is district court action which measures our appellate jurisdiction under § 1291. The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be. Thus, in the words of Catlin v. United States, supra, the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment, or, as Judge Ridge said, in Smith v. Sherman, supra, p. 551 of 349 F. 2d, the district court's action by no means was 'the last word of the law.'"

The identical set of circumstances existed in the present case. Until and unless the Board reconvened and completed its functions neither party had really been hurt and neither party had an order from which it could perfect a valid appeal. Remand orders have long been recognized as possessed of non-appealability character with perhaps the most succinct characterization of the remand order stated by the Appellate Court below in its decision in this case.

"A remand order for further proceedings is not a final decision contemplated by § 1291. Bohms v. Gardner, supra; Marshall v. Celebrezze, 3 Cir., 351 F. 2d 467; Mayersky v. Celebrezze, 3 Cir., 353 F. 2d 89; Stathatos v. Arnold Bernstein S. S. Corp., 2 Cir., 202 F. 2d 525.

"We are convinced that when the law is applied to the facts of this case, the conclusion must follow that the judgments appealed from are not final decisions. The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action" (419 F. 2d, l. c. 935).

CONCLUSION

Respondent respectfully urges that by no standard is this case worthy of review by this Court. Not only is the decision below correct, but long standing custom and practice of this Court announced with authority and certainty so many times require denial of a Petition for Writ when, as here, the original controversy between the parties has been fully and finally settled by them.

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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APPENDIX.

APPENDIX A

Joint Suggestion of Mootness and Joint Motion to Vacate the Judgment Below and to Remand the Case to the District Court With a Direction to Dismiss

Come now the Appellants and the Appellee, by their respective counsel, and jointly show to the Court that this case has been settled by agreement of the parties. There remains outstanding the District Court's Order remanding the cause to Public Law Board No. 34 for that Board to take certain specified actions which should not be taken now that the underlying dispute is settled and moot.

Wherefore, the parties jointly move this Court to vacate the judgment below and to remand the action to the United States District Court for the Eastern District of Missouri with a direction to dismiss the action as moot. This is the appropriate procedure. Cf. *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39; *Brotherhood of Locomotive Firemen v. Toledo, P & W R. Co.*, 332 U. S. 748; *Security & Exchange Commission v. Harrison*, 340 U. S. 908; *Howard v. United States*, 340 U. S. 898; *Barnes v. Akron, C. & Y R. Co.*, 348 U. S. 893.

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